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**State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON**

CONCERNED FRIENDS OF FERRY COUNTY
and DAVID ROBINSON,

Petitioner,

v.

FERRY COUNTY,

Respondent.

Case No. 04-1-0004

ORDER ON COMPLIANCE

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I. SYNOPSIS

Counties are required under RCW 36.70A.020(13) to identify and encourage the preservation of lands, sites, and structures that have historical or archaeological significance. On February 9, 2004, Ferry County Commissioners adopted an ordinance proposing to protect such sites or structures. The Petitioners herein challenged this ordinance and the Growth Management Hearings Board (Board) found the ordinance that was adopted an unrealistic designation of responsibility for the costs of the survey and mitigation plans required there under.

For compliance the County adopted new language, which required the land owner/developer to pay for any required predetermination survey. The Petitioners objected because the new language limited the landowner's liability to the predetermination survey and provided that if others desired further surveys, they will not be the responsibility of the landowner/developer.

1 Upon review of the language of the Ordinance and the requirements of the Growth
2 Management Act, the Board finds that the newly adopted language brings the County into
3 compliance on this issue and the Petitioners have not carried their burden of proof.

4 II. PROCEDURAL BACKGROUND

5 On April 8, 2004, CONCERNED FRIENDS OF FERRY COUNTY and DAVID ROBINSON,
6 by and through their representative, David Robinson, filed a Petition for Review.

7 On May 6, 2004, the Board held a telephonic Prehearing conference. Present were
8 Dennis Dellwo, Presiding Officer, and Board Members Judy Wall and D.E. "Skip" Chilberg.
9 Present for Petitioner was David Robinson. Present for Respondent was Steve Graham.

10 On May 7, 2004, the Board issued its Prehearing Order.

11 On July 22, 2004, the Board received Petitioner's Hearing on the Merits Brief.

12 On August 17, 2004, the Board received Respondent's Hearing on the Merits Brief.

13 On August 20, 2004, the Board received Petitioner's Hearing on the Merits Reply
14 Brief.

15 On August 26, 2004, the Board held the Hearing on the Merits. Present were Dennis
16 Dellwo, Presiding Officer, and Board Members Judy Wall and D.E. "Skip" Chilberg. Present
17 for Petitioner was David Robinson. Present for Respondent was Steve Graham.

18 On September 8, 2004, the Board issued their Final Decision and Order.

19 On June 28, 2005, the Board received the Board received Respondent's Statement of
20 Action Taken to Comply.

21 On November 1, 2005, the Board issued its Order Setting Briefing and Compliance
22 Schedule.

23 On November 28, 2005, the Board received Petitioner's Brief for 1st Compliance
24 Hearing.

25 On December 13, 2005, the Board received Respondent's Brief for First Compliance
26 Hearing.

On December 20, 2005, the Board received Petitioner's Reply Brief for 1st Compliance
Hearing.

1 On December 29, 2005, the Board held a telephonic compliance hearing. Present
2 were Dennis Dellwo, Presiding Officer, and Board Members Judy Wall and John Roskelley.
3 Present for Petitioner was David Robinson. Present for Respondent was Steve Graham.

4 III. STANDARD OF REVIEW

5 Comprehensive plans and development regulations (and amendments thereto)
6 adopted pursuant to the Growth Management Act ("GMA" or "Act") are presumed valid
7 upon adoption by the local government. RCW 36.70A.320. The burden is on the Petitioners
8 to demonstrate that any action taken by the respondent jurisdiction is not in compliance
with the Act.

9 The Washington Supreme Court has summarized the standards for Board review of
10 local government actions under Growth Management Act. It was stated:

11 The Board is charged with adjudicating GMA compliance, and, when
12 necessary, with invalidating noncompliant comprehensive plans and
13 development regulations. RCW 36.70A.280.302. The Board "shall find
14 compliance unless it determines that the action by the state agency, county or
15 city is clearly erroneous in view of the entire record before the county, or city
16 is clearly erroneous in view of the entire record before the Board and in light
17 of the goals and requirements of [the GMA]." RCW 36.70A.320(3). To find an
action "clearly erroneous" the Board must be "left with the firm and definite
conviction that a mistake has been committed." *Dep't of Ecology v. Pub. Util.*
Dist. No. 1, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

18 *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543,
19 552, 14 P.3d 133, 138 (2000).

20 The Board will grant deference to counties and cities in how they plan under Growth
21 Management Act (GMA). RCW 36.70A.3201. But, as the Court has stated, "local discretion is
22 bounded, however, by the goals and requirements of the GMA." *King County v. Central*
Puget Sound Growth Management Hearings Board, 142 Wn.2d 543, 561, 14 P.2d 133
23 (2000). It has been further recognized that "[c]onsistent with *King County*, and
24 notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly
25 when it foregoes deference to a . . . plan that is not 'consistent with the requirements and
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goals of the GMA." *Thurston County v. Cooper Point Association*, 108 Wn.App. 429, 444, 31 P.3d 28 (2001).

The Board has jurisdiction over the subject matter of the Petition for Review. RCW 36.70A.280(1)(a).

IV. ISSUES PRESENTED

Has Ferry County properly modified the Development Regulations contained in Ordinance #2004-01 in order that Historic Archaeological Resources are identified and protected as required by RCW 36.70A.020(13)?

V. ARGUMENT, DISCUSSION AND ANALYSIS

The Parties Positions:

Petitioners' Position:

The Petitioners contend that the County still has not corrected its Regulations so that Archaeological sites will be adequately identified and protected. The Petitioners' complaint is in the following language:

The applicant would only be responsible for the cost of the predetermination survey, if required. (Section 8.03 of Ordinance #2005-04).

The Petitioners contend that the effect of this language is to shift the burden of paying for further surveys and required mitigation to someone else or the County or the site will not be protected.

The Petitioners believe that under the changes adopted, parties other than the landowner/developer, will be required to pay for any evaluation after a predetermination survey. If the landowner/developer is not responsible, the Petitioners ask who would be. They contend that the State, Federal Government or the Tribes cannot be forced to be responsible for necessary surveys or mitigation.

Respondents Position:

The County contends that it has addressed the problem identified by the Board in the Final Decision and Order. The County further contends that the new language does not shift

1 the burden of future surveys to someone else. The language provides that others may
2 perform other surveys if they feel it is necessary.

3 The County further contends that the Petitioners have not carried their burden of
4 proof. The County has addressed the defect named by the Board and the Petitioners have
5 shown nothing otherwise. Further the County states that other governmental agencies are
6 not being asked to or required to perform any other services. However, if someone or some
7 agency believes that another survey is needed, they will have to be responsible for the
8 costs.

9 Pursuant to a question from the Board, counsel for the County contended that the
10 following language is mandatory: "If an archaeological site or significant historic
11 archaeological resource is identified in the known site location records or through survey, a
12 protection plan shall be developed by the landowner/developer, the affected tribe, and
13 archaeologist, and the OAHP." Further the County contends that a permit would not be
14 issued in such a case without that approved plan. It was also made clear by the County that
15 the landowner/developer shall be responsible for the cost of such a plan.

16 **Board Discussion:**

17 RCW 36.70A.020(13) identifies one of the Growth Management Act's (GMA) goals:

18 (13) Historic preservation. Identify and encourage the preservation of lands,
19 sites, and structures that have historical or archaeological significance.

20 Except for the defect noted in the Final Decision and Order herein, Ferry County has
21 adequately provided for preservation of sites and structures of historical or archaeological
22 significance. With the original ordinance, the County had developed an unrealistic
23 designation of responsibility for the costs of the survey and mitigation plan. The original
24 language of Ordinance #2004-01 provided that the costs for any archaeological survey and
25 costs of mitigation and/or protection plan shall be born by the entity which claims that such
26 a site exists. The effect of this language caused the laudable protections to be ineffective.
This language was found out of compliance with the Growth Management Act. (See FDO
herein).

1 To bring them into compliance, Ferry County struck the offending paragraph and
2 inserted the following language:

3 The applicant would only be responsible for the cost of the predetermination
4 survey, if required. After notification of the predetermination survey, any
5 interested party must respond within 30 days of notification as to the need of
6 additional surveys. If additional surveys are performed by the interested party,
7 they must be completed not to exceed 6 months. (Sic).

8 The Petitioners contend that this language shifts any further survey or mitigation
9 costs to someone else, thus resulting in likely failure to protect archaeological sites and
10 objects.

11 The County contends that such language does not shift the burden to others. The
12 landowner/developers are responsible for the predetermination survey and mitigation plan
13 costs. The County made it clear that the landowner/developer will pay for the
14 predetermination survey if required and, if an archaeological object is discovered, work on
15 the development will cease and Ferry County Planning Department and Office of
16 Archaeology and Historic Preservation shall be notified and a permit will not be issued
17 without an approved protection plan.

18 With the clarifications and corrections noted above, the County is found to be in
19 compliance on this issue. The Petitioners have not carried their burden of proof.

20 **Conclusion:**

21 The Board finds the County in compliance on the issue raised herein.

22 **VIII. ORDER**

23 Ferry County is found in compliance with the Growth Management Act on the Issue
24 raised herein.

25 **Pursuant to RCW 36.70A.300 this is a final order of the Board.**

26 **Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the
mailing of this Order to file a petition for reconsideration. The original and four
copies of a motion for reconsideration, together with any argument in support
thereof, should be filed with the Board by mailing, faxing, or otherwise
delivering the original and four copies of the motion for reconsideration directly**

1 to the Board, with a copy served on all other parties of record. Filing means
2 actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-
3 02-240, WAC 242-02-330. The filing of a motion for reconsideration is not a
prerequisite for filing a petition for judicial review.

4 Judicial Review. Any party aggrieved by a final decision of the Board may appeal
5 the decision to superior court as provided by RCW 36.70A.300(5). Proceedings
6 for judicial review may be instituted by filing a petition in superior court
7 according to the procedures specified in chapter 34.05 RCW, Part V, Judicial
8 Review and Civil. The petition for judicial review of this Order shall be filed with
9 the appropriate court and served on the Board, the Office of the Attorney
10 General, and all parties within thirty days after service of the final order, as
provided in RCW 34.05.542. Service on the Board may be accomplished in person
or by mail. Service of the Board means actual receipt of the document at the
Board office within thirty (30) days after service of the final order. A petition for
judicial review may not be served on the Board by fax or electronic mail.

11 Service. This Order was served on you the day it was deposited in the United
12 States mail. RCW 34.05.010(19).

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14 **SO ORDERED** this 3rd day of January 2006.

15 EASTERN WASHINGTON GROWTH MANAGEMENT
16 HEARINGS BOARD

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Dennis Dellwo, Board Member

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Judy Wall, Board Member

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John Roskelley, Board Member